No. 11923

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE, UNITED STATES OF AMERICA.

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Jurisdictional Statement.

The United States sued the appellant Howard B. Morrow on a guaranty in the District Court of the United States for the Southern District of California, pursuant to Judicial Code, Sec. 24, as amended, *28 U. S. Code, Sec. 41, Subdivision (1).* [R. pp. 2-7.] From a judgment for the plaintiff [R. p. 58], defendant Morrow appeals to this Court, pursuant to Judicial Code, Sec. 128, as amended, *28 U. S. Code 225(a)-First.* [R. pp. 59, 63, 166.] Jurisdiction below and here is based on said sections.

Statement of the Case.

The United States, through the Federal Reserve Bank, is the owner and holder, by transfer, of a promissory note for $225,000 made by Morrow Aircraft Corporation, dated November 18, 1942, and payable on demand on or before November 15, 1943, to the order of American National Bank of San Bernardino, California. [R. pp. 30-31, 69-75, 156-157.]

The $225,000 note is secured in full by a chattel mortgage, also dated November 18, 1943, covering personal property of the Company [R. pp. 29-37, 134]; and, to the extent of $100,000, is also secured by a guaranty executed by Howard B. Morrow, dated November 13, 1942. [Exhibit I to the Complaint, R. pp. 4-7, 121.]

In November, 1942, Howard B. Morrow, the appellant guarantor, was the president and the majority stockholder of Morrow Aircraft Corporation, and apparently remains so to date. [R. pp. 88, 112.]

The $225,000 note, the chattel mortgage and Morrow's guaranty were all executed as a part of one transaction, the purpose and effect of which was to retire a $100,000 company note then held by said American National Bank, and to secure $125,000 additional money with which to engage in the manufacture of certain war merchanise, under contracts with the War Department of the United States. [R. pp. 71-74, 90, 104, 153.]

The $225,000 loan was made as a "Regulation B" loan, *i. e.*, guaranteed in part by the United States, through its War Department. [R. pp. 76, 81-82.]

The Company had previously been manufacturing war material for the War Department, and wished to continue

and increase its production. [R. pp. 76, 78-80.] The financial re-arrangement of November 18, 1942, between the Bank, Howard B. Morrow and Morrow Aircraft Corporation was the result.

The next day, on November 19, 1942, on recommendation of an Army liaison officer, of the Fiscal Division, stationed at the Federal Reserve Bank in Los Angeles, Morrow Aircraft Corporation employed and installed Guy Goodwin as general manager of its plant. [R. p. 123.]

In December, 1942, disagreements over plant operating policies arose between Howard B. Morrow, as president, and Mr. Goodwin, as general manager [R. pp. 124, 45-46, 135-136]; and shortly afterward, to wit, on January 19, 1943, Morrow Aircraft Corporation entered into a Joint Adventure Agreement [R. pp. 10-23] with Fritz Ziebarth (who had been working with the company previously), under which the said Joint Adventure, with Ziebarth in active charge supplanting Goodwin, took over most or all of the operations at the Morrow Aircraft Corporation plant, the Company thereafter relying on its share of profits from the Joint Adventure as its chief source of income, rather than from its operation of the plant.

One of Ziebarth's preliminary requirements before entering into this Joint Adventure with Morrow Aircraft Corporation was that the Company would secure from the American National Bank its consent that the Joint Adventure might have the use of all the tools, fixtures, equipment, patents and patent rights of the Company, and that the Bank would not foreclose or enforce any lien thereon, under the chattel mortgage, during the Joint Adventure, "except with the consent of Ziebarth." [R. pp. 88-90.]

On January 10, 1943, Howard B. Morrow as president of the Company, requested the Bank to enter into such an agreement [see Plaintiff's Exhibit No. 1, R. pp. 43-44, 87-90, 100-102, 119, 130, 153-154]; and pursuant to his said request, the Bank on January 19, 1943 gave the consent he asked [R. pp. 37-41]; and among other things, it agreed as follows:

> "In consideration of the terms and conditions of that certain Joint-Adventure Agreement, entered into as of the 19th day of January, 1943, between Fritz Ziebarth, herein referred to as Ziebarth, an individual, of Reno, Nevada, and The Morrow Aircraft Corporation, a California corporation, of Rialto, California, hereinafter referred to as Morrow, and the execution and delivery of a certain assignment by Morrow, contemporaneously herewith, the undersigned, the American National Bank of San Bernardino, hereinafter referred to as the Bank, hereby consents to the use of the various equipment, tools, facilities, fixtures, patents, and patent rights, now in the possession of Morrow or under its control, by the Joint-Adventure, as provided in said Joint-Adventure Agreement, and further, agrees *not to foreclose, or enforce any lien or claim, on, or upon, any of said tools, fixtures, equipment, patents, or patent rights*, or otherwise interfere with the possession or use of said equipment *during the existence of said Joint-Adventure, except by the written consent of Ziebarth.*" [R. pp. 37-38.]

Ziebarth agreed with Morrow Aircraft Corporation, in their Joint Adventure Agreement, "to advance all necessary operating capital, to run and operate the equipment and facilities" and to complete the Company's contracts for war material then agreed upon between them, or thereafter expressly approved by him. [R. pp. 10-23, 15.]

The Joint Adventure became effective January 19, 1943, and terminated January 19, 1946. [R. pp. 110, 117.]

The $225,000 promissory note of the Company was not paid when due on November 15, 1943, and on November 29, 1944, the Bank assigned and delivered the note and guaranty to the United States of America (Federal Reserve Bank). [R. pp. 156-157, 54.]

There was a default of in excess of $100,000 on the note, and on May 4, 1945, the United States sued Howard B. Morrow on his guaranty, asking judgment against him in the sum of $100,000, with interest at the rate of 6% thereon from November 13, 1944. [R. pp. 2-4.]

On January 11, 1946, defendant Morrow filed a motion to dismiss the Complaint on the ground that "the primary obligation upon which it is based is not due and payable" since the Joint Adventure Agreement was then "still in effect," and the American National Bank of San Bernardino (plaintiff's assignor) had agreed "not to foreclose or enforce any lien or claim upon any of the tools, fixtures, equipment, patents or patent rights," *i. e.,* the chattel mortgage "except by written consent of Ziebarth," during the existence of the Joint Adventure. [R. pp. 7, 9-10, 37-38.] This presented a question of prematurity of suit.

The motion to dismiss was heard and overruled by the District Court on February 4, 1946, two weeks after the termination of the Joint Adventure Agreement. [R. pp. 24, 117.]

On March 13, 1946, defendant Howard B. Morrow answered the complaint raising three defense contentions, to wit:

1. *Prematurity of Suit*—That when the complaint was filed "no cause of action existed on the said

promissory note as against Morrow Aircraft Corporation" because the American National Bank's "Consent, Waiver and Agreement of Indemnity" provided that said Bank would not foreclose the chattel mortgage securing it during the joint adventure, except with Ziebarth's consent. [R. p. 28.]

2. *Exoneration of Guarantor by "Extension of Time"*—That by making such an agreement the Bank had "materially altered and extended the due date of the promissory note . . . without the knowledge or consent of the defendant (Howard B. Morrow)," thereby exonerating him as guarantor. [R. pp. 28-29.]

3. *Error in Description of Note Guaranteed*—A third defense, injected into the Answer through general denials, was that the guaranty was always ineffective because, being dated November 13, 1942, it erroneously described the primary obligation thereby secured as "that certain *indebtedness* of Morrow Aircraft Corporation to the (American National) Bank, *evidenced by a promissory note of even date herewith, in the face amount of $225,000*," whereas the $225,000 note actually intended bears date November 18, 1942, five days later. [R. pp. 4-5, 30-31; and Par. III, IV, R. pp. 25-26.]

At the opening of the trial on January 2, 1947, Morrow's attorney agreed in effect, that since the Joint Adventure had been terminated a year earlier, on January 19, 1946, the defense of prematurity of suit was no longer effective [R. p. 70]; and the parties stipulated that the $225,000 note and guaranty, although dated differently, were executed as a part of one and the same transaction.

[R. pp. 71-74, 104, 153.] Only one $225,000 note was ever executed [R. pp. 89-90]; and it was proved at the trial that the Federal Reserve Bank insisted, at the time of the negotiations for the $225,000 loan, that Howard B. Morrow, who had been a guarantor on the preceding $100,000 obligation, must personally guarantee $100,000 of the increased loan, which *he testified he understood he was doing* in signing the guaranty. [R. pp. 79-80, 89-90.]

The parties also stipulated to nearly all the other facts outlined above [R. pp. 68-75, 156-157], and this left merely one issue of fact, to wit:

> Whether Howard B. Morrow "consented" to the American National Bank's "Consent, etc.," which "Consent, etc." he claimed constituted an "extension of time" for payment of its note by Morrow Aircraft Corporation, and an exoneration of his guaranty, under *California Civil Code,* Sec. 2819, which provides:
>
> "A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

Morrow testified that he never objected to the Bank's "Consent, etc." before the suit was filed [R. pp. 105-106], nor demanded foreclosure of the chattel mortgage under *California Civil Code,* Sec. 2845, which provided:

> "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue,

> and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is *exonerated to the extent to which he is thereby prejudiced.*"

Proportionate exoneration under Sec. 2845, supra, for alleged neglect to foreclose the mortgage was never claimed by Morrow, and in view of his guaranty obviously could not have been. *Full exoneration under Sec. 2819, supra,* for alleged alteration of the *"original obligation of the principal"* or for alleged impairment or suspension of "the remedies or rights of the creditor against the principal *with respect thereto," without his consent,* has always been his asserted defense.

The District Court found as a fact, on overwhelming proof [R. pp. 87-90, 100-106, 119, 130, 153-154], that appellant Morrow *did consent* to the Bank's "Consent, etc.," and the Court also held that the variance in date between the note and the description thereof in the guaranty was *immaterial* under the proof; and hence that *neither exonerated Morrow* on his guaranty. [Memorandum Opinion, R. pp. 46-52; Findings of Fact and Conclusions of Law, R. pp. 53-57.]

Accordingly, on June 3, 1947, the District Court entered its judgment in favor of the United States against Howard B. Morrow, as guarantor, for $100,000, plus interest thereon at the rate of 6% per annum from May 4, 1945 (the date this suit was filed), plus $29.23 court costs. [R. pp. 7, 58-59.]

Morrow filed his notice of appeal from the judgment on August 29, 1947 [R. p. 59], and after some extensions of time for filing and docketing the appeal [R. pp. 60-63], the appeal was duly prefected.

Questions Involved on Appeal.

The questions involved here are:

Whether the suit was prematurely filed, and if so, whether the question of prematurity is moot; and whether Morrow's guaranty was exonerated or discharged (a) by the flaw in the description of the note's date in the guaranty [R. pp. 4-5, 30-31], or (b) by the Bank's "Consent, etc." [R. pp. 37-41.]

(The Appellant's claim of exoneration through the Bank's "Consent, etc." is invalid under *California Civil Code,* Sec. 2819: (a) if he *consented* thereto, as the District Court found as a fact he did [R. pp. 46-57]; or (b) if it did not constitute a material alteration, impairment or suspension of the "original obligation" (note) of Morrow Aircraft Corporation, as Appellee contends it did not. As the overwhelming proof sustains the judgment below, in any event, our second point that Morrow's consent to the Bank's "Consent, etc." was actually unnecessary, is cumulative, and probably superfluous.)

ARGUMENT.

Summary.

The judgment below should be affirmed because:

1. The suit was never premature; and the question of prematurity is moot.

2. The flaw in the description of the note's date in the guaranty is immaterial; and did not render the complaint insufficient.

3. Morrow consented in advance, in the guaranty, and also in his letter at the time of the formation of the joint adventure. to the temporary waiver of foreclosure under the chattel mortgage involved in the Bank's "Consent, etc.," as the District Court properly found; although want of such consent would not have exonerated the guaranty.

4. The District Court's Opinion and Findings of Fact and Conclusion of Law are supported by the proof, and the judgment should be affirmed.

I.

The Suit Was Not Premature; and the Question of Prematurity Is Moot.

1. The defense of prematurity is based on the erroneous theory that the Bank's "Consent, etc." *extended the time for payment of the Company's note, which it did not* The Bank's "Consent, etc." was merely a temporary waiver of a right to subject one of two securities, in case of default. It had no effect whatever on the note, or its due date, November 15, 1943; and this suit, filed on the guaranty on May 4, 1945, was never premature.

[Compare the note, R. pp. 30-31; the chattel mortgage, R. pp. 29-37; the Bank's "Consent, etc.," R. pp. 37-41; the Joint Adventure Agreement, R. pp. 10-23; and the date suit was filed, R. p. 7.]

2. Also, the guaranty (which designated Howard B. Morrow, as "the Guarantors," the Morrow Aircraft Corporation as "the Borrower," and the American National Bank as "the Bank") provided among other things as follows [R. pp. 4-5]:

> "The obligations hereunder are joint and several, and *independent of the obligations of Borrower, and a separate action or actions may be brought and prosecuted against Guarantors whether action is brought against Borrower* or whether Borrower be joined in any such action or actions; and Guarantors waive the benefit of any status of limitations affecting their liability hereunder or the enforcement thereof.
>
> "Guarantors waive any right to require Bank to (a) proceed against Borrower; (b) *proceed against or exhaust any security held from Borrower; or,* (c) *pursue any other remedy in Bank's power whatsoever.*" . . .

3. Not only was the suit never premature under these quoted provisions of the guaranty itself, but the entire subject is now moot in any event. The Joint Adventure, Agreement terminated January 19, 1946, prior to the hearing on the motion on February 4, 1946, and prior to the defendant's answer March 13, 1946, and the Bank's "Consent, etc." terminated with the Joint Adventure. [R. pp. 24, 37-38, 41, 117.] Consequently, and under any theory, the suit was not premature after January 19, 1946, and the question has since been moot in any event.

4. At the opening of the trial, Morrow's counsel admitted as much in effect [R. p. 70], and the point was not thereafter touched on in the record.

II.

The Flaw in the Description of the Note's Date in the Guaranty Is Immaterial; and Did Not Render the Complaint Insufficient.

1. The variance is immaterial, since the note and guaranty were executed as a part of *one transaction,* only *one $225,000 note* was ever executed, and there is *no question* that the $225,000 note dated November 18, 1942 is the one *referred to* in the guaranty and intended to be secured thereby. "It is a case of mis-description in part and the maxim *'falsa demonstratio non nocet'* applies."

Snow v. Holmes (1886), 71 Cal. 142, 11 Pac. 856;

Rogers v. Evans (1934), 137 Cal. App. 538, 31 P. (2d) 233;

Text: 41 C. J. 410, Mortgages, Sec. 256, n. 93;

St. Lawrence University v. Farmer (1900), 66 N. Y. Supp. 583, 32 Misc. 410;

Blackburn University v. Weer, 21 Ill. App. 29;

Howland v. Aitch, 38 Cal. 133, 136;

Drovers National Bank v. Browne, 88 Cal. App. 716, 264 Pac. 265.

2. Since the mistake in date is immaterial, an action to reform the guaranty was unnecessary, and a judgment on the complaint without any order of reformation, was proper.

Snow v. Holmes, supra.

3. The complaint averred the execution of the note for $225,000, and pleaded in par. IV [R. p. 3] that Morrow "made executed and delivered the guaranty for the purpose of guaranteeing in said sum of $100,000.00 the payment

of said note of $225,000." The defendant's answer [Par. IV, R. pp. 25-26] admitted the execution of the guaranty, but made a general denial of the allegation of the purpose thereof, which thus became an issue in the case. The evidence proved such purpose, and the flaw in date became immaterial. [R. pp. 71-80, 90, 104, 153.] The District Court so held. [R. pp. 47-49, 54.]

III.

Morrow Consented in Advence, in His Guaranty and in His Letter at the Time the Joint Adventure Was Formed, to the Temporary Waiver of Resort to the Mortgaged Chattels Involved in the Bank's "Consent, Etc." The District Court Properly so Found on Overwhelming Proof, Although Want of Such Consent Would Not Have Exonerated the Guaranty.

1. Morrow's guaranty, signed in November, 1942, expressly waived "any right to require the Bank to . . . (b) proceed against or exhaust any security held from the Borrower (the Company); or (c) pursue any other remedy in the Bank's power whatsoever." [R. p. 5.] This was a waiver in advance of any right to require the Bank to foreclose the chattel mortgage; and *ipso facto* was a consent for the Bank to defer such foreclosure, as it subsequently agreed to do in its "Consent, etc."

2. Such waiver by Morrow was certainly effective, until and unless he should make some such affirmative demand for foreclosure as is contemplated by *California Civil Code,* Sec. 2845; and he never made any such demand.

3. On the contrary, on January 10, 1943, Morrow, as president of the Company wrote the Bank as follows [R. pp. 43-44]:

> "In our agreement with Fritz Zeibarth, in forming the Morrow Aircraft-Zeibarth joint-adventure, this bank will be required to make the following commitments:
>
> . . . . . .
>
> "2. Bank shall consent to the use of all tools, fixtures and equipment, patents and patent rights now in possession of Morrow by the joint-adventure and bank shall agree to forbear foreclosure or enforcing any lien on any claim upon or against any of the tools, fixtures or equipment, patents or patent rights, or otherwise interfering with the possession or use thereof during the term of the joint-adventure agreement except with the consent of Zeibarth.
>
> . . . . . .
>
> "As soon as we have these commitments, the joint-adventure agreement can be entered into."

Pursuant to this letter, on January 19, 1943, the Bank executed its "Consent, etc." [R. pp. 37-40] in substantially the language Morrow requested, simultaneously with the execution of the Joint Adventure Agreement. [R. pp. 10-23.]

4. Morrow testified that he never objected to the "Consent, etc." [R. pp. 105-106]; and on the facts, it was impossible for the Court to conclude otherwise than it did, to wit, that Morrow *did consent* thereto. [R. pp. 50-52, 55-57.]

5. But to avoid exoneration of his guaranty, Morrow's consent to the Bank's "Consent, etc." was unnecessary. This is true for two reasons:

(A) Since the opinion in *Braun v. Crew* (1920), 183 Cal. 728, 192 Pac. 531, which was cited by the District Court [R. p. 49], the rule of exoneration of sureties stated in *California Civil Code,* Sec. 2819 has been modified by the Uniform Negotiable Instruments Law, Secs. 119, and 120, *California Civil Code,* Secs. 3200 and 3201. The new rule is:

> Neither the maker nor guarantor, of a negotiable promissory note secured by a mortgage, is exonerated by a binding agreement for an extension of time to foreclose the mortgage, made by the holder of the note with the subsequent transferee of the mortgaged property, who has not assumed the payment of the note, although such extension agreement is made without the knowledge or consent of either the maker or guarantor of the note.

Mortgage Guarantee Co. v. Chotiner (1936), 8 Cal. (2d) 110, 64 P. (2d) 138, 108 A. L. R. 1080 and note p. 1088;

Kaufman v. Penn Mut. L. Ins. Co., 64 F. (2d) 160 (C. C. A., D. C., 1933);

Schram v. Brooks, 41 F. (2d) 874, 876 (D. C., Mich., 1941);

Annotations: 48 A. L. R. 715, 723;
65 A. L. R. 1425.

(B) In view of this modification of Sec. 2819 by Secs. 3200 and 3201 of the *California Civil Code,* Morrow's right to exoneration, if any, as guarantor of a negotiable instrument, would be limited to *proportionate exoneration* (*for neglect to proceed* against mortgaged security, under *California Civil Code,* Sec. 2845) and would not extend to the *full exoneration* (for *release* of the mortgaged property, under said Sec. 2819, as modified by Secs. 3200 and 3201.) Sec. 2845 covers the effect of a temporary waiver of resort to other security; and under the rule *ejuisdem generis,* Sec. 2819 should have application *only* in event of a full release of such security, rather than to a mere temporary waiver or neglect to subject it. Especially is this true, in view of the new Sec. 3201(6).

Morrow waived in advance any right to rely on *proportionate exoneration under Sec. 2845,* by waiving, in his guaranty, any right to require resort to other security [R. p. 5]; and he is in no equitable position now to invoke the even more stringent rule of *full exoneration under Sec. 2819,* regardless of said Sec. 3201(6).

6. The factual situation in this case is the equivalent of that in *Mortgage Guarantee Co. v. Chotiner, supra,* as shown below:

(A) In both cases, the maker of the note was a family corporation, and the note was guaranteed by officers of the company, who were also members of the family;

(B) In each case also, the corporation-maker of the note executed a mortgage to secure the same, and after

negotiating the note, transferred the mortgaged property to another, without the transferee assuming payment of the note. (The only difference is that in the *Mortgage Guarantee Co.* case, there was an outright sale of the mortgaged realty, while in this case the Company temporarily transferred the use of the mortgaged chattels to the Joint Adventure it formed with Fritz Ziebarth. This is a difference without a legal distinction.)

(C) In each case also, the holder of the note agreed with the maker's transferee to postpone foreclosure on the mortgaged property, but without releasing the lien thereon. (The agreement here was made by the Bank with the Joint Adventure, and was subject alone to Ziebarth's consent, and not to the maker's consent. That is, the postponement agreement was actually with a stranger to the note.)

(D) In the *Mortgage Guarantee Co.* case, the California Supreme Court held that the extension agreement with the transferee did not exonerate either the maker or the guarantor of the note under *California Civil Code,* Secs. 2819 and 3201(6), regardless of whether they knew of or consented thereto.

On its facts, the holding in the *Mortgage Guarantee Co.* case is peculiarly pertinent and appropriate here. Morrow was not exonerated, either proportionately or in full, by the Bank's "Consent, etc." His guaranty obligation continued in full, regardless of whether he consented thereto or not.

IV.

The District Court's Memorandum Opinion and Its Findings of Fact and Conclusions of Law Are Fully Supported by the Evidence, and the Judgment Thereon Should Be Affirmed.

MEMORANDUM OPINION OF THE DISTRICT COURT.
[R. pp. 46-52.]

(*Erratum:* Through typographical error the caption of this Opinion appears as "Memorandum Agreement" in the printed record).

> "The United States sues as the assignee of a guarty executed by the defendant in the amount of $100,000.00. More than $100,000.00 remains due and unpaid on the primary obligation.
>
> "The case presents two issues: First, when a contract of guaranty contains a recital to the effect that it secures a note of even date therewith, is the guarantor exonerated because the note was actually executed five days later, even though the note and guaranty were executed as part of the same transaction? Second, if the defendant-guarantor were originally bound, did he consent to a modification in the security, or was he exonerated when the obligee contracted not to foreclose on the mortgage securing the note until the termination of a certain joint-adventure?
>
> "In November, 1942, the Morrow Aircraft Corp. (hereinafter called the Corporation), of which the defendant was the president and majority stockholder, needed money to carry on its business in the construction of airplane parts for the national defense. On November 13, 1942, the defendant entered into a contract of guaranty, agreeing to pay the American National Bank of San Bernardino (hereinafter called

the Bank) or order, on demand, the indebtedness of the Corporation 'evidenced by a promissory note of even date herewith, in the face amount of $225,-000.00,' the defendant's liability not to exceed $100,-000.00. The loan was actually made sometime after November 18, 1942, and the promissory note of the Corporation was issued bearing that date. The note was secured by a chattel mortgage on almost all of the property of the Corporation, as well as all of the defendant's stock therein.

"Later in November, 1942, the government placed one Guy L. Goodwin in the plant as manager. In January, 1943, the Corporation began negotiations with one Ziebarth to enter into a joint-adventure for carrying out its contracts. Ziebarth would not close the transaction until the Bank, among other things, had agreed not to foreclose on its mortgage during the existence of the joint-adventure, except with his consent. On January 10, 1943, the defendant, in his capacity as president of the Corporation, signed a letter from him to the Bank, wherein Ziebarth's conditions were stated. This letter was prepared by the Bank preparatory to its execution of the waiver Ziebarth was demanding. On January 19, 1943, the Bank executed a 'Consent, Waiver, and Agreement of Indemnity,' and the joint-adventure was entered into on the same day The joint-adventure was terminated in January, 1946. The note has been assigned by the Bank to the United States, and the unpaid balance exceeds $100,000.00.

"A guaranty cannot exist if there is nothing to guarantee. *Kilbride v. Moss,* 113 Cal. 432, 45 Pac. 812. The defendant contends that since the note purportedly secured by the guaranty did not exist at the time of the execution of the guaranty, the guaranty is of no effect. A guaranty is a contract to answer

for the debt of another, and if the debt does not exist, the guaranty cannot.

"But defendant admits that the guaranty was executed as part of the same transaction with the note. The mere fact that the guaranty was executed before the note will not make it void. In *Howland v. Aitch,* 38 Cal. 133, 136, the court stated that:

> " 'It is a matter of no moment at what time, relative to each other, the contracts may have been made and delivered, and the consideration may have passed if they together constituted one transaction.'

The language was applied in *Drovers' National Bank v. Browne,* 88 Cal. App. 716, 264 Pac. 265, 268, where the defendant had executed a guaranty before the issuance of the note secured, under circumstances very similar to those now under consideration, and the court said that: 'Defendant cannot complain that the guaranty was executed 5 days before the renewal of the note maturing November 14, 1921.'

"The guaranty refers to a note 'of even date.' The words quoted were not intended to limit the defendant's liability to a note of even date, but merely to describe a note which was to be executed as a part of the transaction. The descriptive words chosen were clearly identified by the defendant's own testimony. *Snow v. Holmes,* 71 Cal. 142, 11 Pac. 856, 858. Therefore, the primary obligation upon which the guaranty could stand did exist, and the defendant was bound upon his guaranty at the time the note was executed.

"It remains to be decided whether the defendant was exonerated because of the modification in the

terms of the security held by the bank. A surety or guarantor is exonerated where the original obligation is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto are in any way impaired or suspended, unless the surety knows of the change and consents thereto. *Braun v. Crew,* 183 Cal. 728, 192 Pac. 531, 534. The defendant had knowledge of the Ziebarth deal, so the sole issue remaining is whether he, as guarantor, consented to the Bank's waiver.

"Consent may be express or implied from the conduct of the surety, but the burden of proof is on the plaintiff to show consent was granted, *Tuohy v. Woods,* 122 Cal. 655, 667, 55 Pac. 683, 684; and the mere fact that the surety remained silent after he had knowledge of the alteration is insufficient in itself to preclude him from claiming the release. *Pacific National Agricultural Credit Corp. v. Hagerman,* 39 N. M. 549, 51 P. (2d) 857, 101 A. L. R. 1301. But when his silence is coupled with affirmative action which would lead the obligee reasonably to believe consent had been given, he is under a duty to obligee to disavow his liability promptly. *Christie v. Commercial Casualty Ins. Co.,* 6 Cal. App. (2d) 710, 45 P. (2d) 263, 267.

"In *Hallock v. Yankey,* 102 Wis. 41, 78 N. W. 156, the defendant, as treasurer of the company whose note he had guaranteed, negotiated several extensions of the note. He was held liable on the guaranty despite the lack of express consent to the change in terms of the original obligation because of his affirmative action. The court said:

> " 'Of course, the obligations of a surety are *strictissimi juris.* He may have knowledge that

an extension has been granted to his principal, and the law does not impose on him the duty to speak. 2 *Brandt, Sur.,* Sec. 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent. *Cf. Mundy v. Stevens,* 3 Cir., 61 Fed. 77, 85.'

Except that the defendant here was president of the corporation, instead of the treasurer, the cases are almost identical, and the decisions should be the same. The defendant's conduct was such that no reasonable man could but believe that he had consented to the modification in his personal capacity.

"It is difficult to conceive a president of a corporation, owning a controlling interest therein, consenting to a present waiver of the right to foreclose by the holder of the note and in the same breath claiming as an individual he did not consent. Whatever was to the interest of the corporation was certainly to the interest of the defendant. By consenting to the terms of the joint-adventure under his letter of January 10, 1943, he was either unfaithful to the corporation of which he was president or was doing that which he felt furthered the interest of the corporation. His interests and the corporation's were identical. I feel

that the entire picture reflects an implied consent on the part of the defendant.

"I further feel, that notwithstanding defendant's claim to the contrary, he was at all times a free agent and that he was not a rubber stamp, as he now claims. He is and was a business man of wide experience, and like many other business men, he sought to enter into defense work. His venture evidently was a failure. He took the risk and lost, and now seeks to avoid his just obligations by claiming ignorance of the consequence of his own act.

"The defendant's contention that consent may be implied only where there is an element of estoppel is not borne out by cases. Consent is none the less real because it is implied, and no element of estoppel is necessary when consent is given. There was nothing to indicate to the Bank that the alteration in security was not made with his consent, and the defendant's own action in participating in the negotiations preliminary to the alteration by signing the letter of January 10th, without objection or reference to his status as guarantor, strongly indicated that it was given. It is only equitable that he be bound by the terms of the original contract. *Union Oil Co. v. Mercantile Refining Co.,* 8 Cal. App. 768, 97 Pac. 919.

"The plaintiff is entitled to judgment and counsel for the plaintiff is directed to submit forthwith proposed findings and judgment in accordance with this memorandum opinion."

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT.

[R. pp. 53-57.]

Findings of Fact.

I.

"The defendant is a resident of the Southern District of California and within the jurisdiction of this Court.

II.

"On November 18, 1942, the American National Bank of San Bernardino, California, loaned to Morrow Aircraft Corporation the sum of $225,000, evidenced by promissory note of the Morrow Aircraft Corporation dated November 18, 1942, in the principal sum of $225,000.

III.

"On November 13, 1942, the defendant herein made, executed and delivered to the American National Bank of San Bernardino his guaranty in writing in the sum of $100,000 for the purpose of guaranteeing in said sum of $100,000 the payment of said note of $225,000.

IV.

"On November 29, 1944, the American National Bank of San Bernardino made, executed and delivered to the United States of America an assignment wherein and whereby, among other things, plaintiff became the holder and owner of said guaranty.

V.

"At the time of filing of this action, and at all times since, there remained due, owing and unpaid upon said $225,000 note a sum of money in excess of $100,000.

VI.

"The $225,000 loan to the corporation was secured by a chattel mortgage on all furniture, fixtures, machinery and equipment, tools, tooling, and accessories owned or to be acquired by the corporation for use in connection with the operation of the manufacturing plant belonging to it.

VII.

"In November of 1942, the Government placed one Guy L. Goodwin in the corporation's plant as manager. Thereafter, in the early part of January, 1943, the corporation began negotiations with one Fritz Ziebarth to enter into a joint adventure for carrying out Morrow Aircraft Corporation's contracts. Ziebarth would not close the transaction until the American National Bank of San Bernardino, among other things, had agreed not to foreclose on its chattel mortgage during the existence of the joint adventure, except with his consent. On January 10, 1943, the defendant in his capacity as president of the corporation signed a letter addressed to the American National Bank of San Bernardino, in which letter the conditions imposed by Ziebarth were stated. On January 19, 1943, the American National Bank of San Bernardino executed a document entitled 'Consent, Waiver and Agreement of Indemnity' and the joint adventure was entered into on the same day. The joint adventure was terminated in January 1946.

VIII.

"The defendant owned the majority of stock in the corporation and actively engaged in the conduct of its business. After the said Guy. L. Goodwin became manager of the plant, the defendant continued to participate in the corporation's affairs.

IX.

"The defendant had knowledge in the month of November 1942 of negotiations which were then being carried on by and on behalf of the corporation for the purpose of borrowing the sum of $225,000 from the American National Bank of San Bernardino. He knew that out of said sum of money there was to be paid a then existing obligation of $100,000 and that he was then obligated as a guarantor of said $100,000. He also knew that one of the requisites of the new loan was the execution of the guaranty up to $100,000 hereinabove mentioned. The guaranty was dated November 15, 1942, and the note for $225,000 was dated November 18, 1942, the loan being consummated some time after November 18, 1942, and each had reference to and constituted one transaction.

X.

"Nine days prior to the execution by the bank of the 'Consent, Waiver and Agreement of Indemnity,' the defendant had knowledge of the proposed joint adventure and of its terms and requirements, and on January 10, 1943, in his capacity as president of the corporation, he signed a letter directed to the bank, wherein said requirements and terms were stated.

XI.

"On May 4, 1945, plaintiff demanded of defendant the payment of the sum of $100,000, in accordance with the terms of the guaranty. Plaintiff has failed and refused to pay the same or any part thereof, and there is now due and owing from defendant to plaintiff the sum of $100,000, with interest at the rate of 6% per annum from and after said date."

Conclusions of Law.

I.

"The defendant consented to the execution by the American National Bank of San Bernardino on the 19th day of January, 1943, of the document entitled 'Consent, Waiver and Agreement of Indemnity' and is not entitled to judgment under his Separate and Second Defense.

II.

Notwithstanding the fact that the guaranty executed by the defendant bore date November 13, 1942, and the primary obligation described in the guaranty as a note of 'even date herewith,' but bearing date November 18, 1942, the execution and delivery of the respective documents were a part of one and the same transaction and constitute consideration for the execution of the guaranty, upon which the plaintiff is entitled to recover.

III.

"Plaintiff is entitled to judgment against the defendant, Howard B. Morrow, in the sum of $100,000, together with interest at the rate of 6% per annum thereon from May 4, 1945, and for costs and disbursements in this action.

"Let judgment be entered accordingly."

Conclusion.

The variance in date, between the $225,000 note and the description thereof in the guaranty, is immaterial; and the American National Bank, in signing the "Consent, Waiver and Agreement of Indemnity" did not agree to any "extension of time" for the payment by Morrow Aircraft Corporation of its said note. The consequences of these conclusions are twofold:

(a) The complaint was sufficient to sustain the judgment.

(b) There was no prematurity of suit, although that issue is now moot.

(c) The "original obligation of the principal" under the note was not "altered, impaired or suspended" by the Bank's "Consent, etc.," within the meaning of *California Civil Code, Secs. 2819, 2845, 3200* and *3201,* and even Morrow's failure to consent thereto would not have exonerated his guaranty under the rule in *Mortgage Guarantee Co. v. Chotiner, supra.*

In addition to all the above, the District Court correctly found as a fact established by overwhelming proof, that Morrow *did consent* thereto, both in advance and at the time the Joint Adventure was formed.

There is no merit to the Appellant's various contentions.

The judgment of the District Court is obviously correct, on the facts and law, and should be affirmed.

Respectfully submitted,

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